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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL AGUILAR CEJA,

Defendant and Appellant.

F068186

(Super. Ct. Nos. CRM016154, CRM025080 & CRM027502)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Mark V. Bacciarini, Judge.

Peter J. Boldin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Brook A. Bennigson, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Daniel Aguilar Ceja had an abusive and often violent relationship with Araceli Hernandez, the mother of his two children. In 2011, he pled no contest to one felony count of corporal injury inflicted upon her (Pen. Code, § 273.5, subd. (a)), along with one felony count of assault with a deadly weapon (§ 245, subd. (a)(1)).[1] He was ordered to have no contact with her for five years.[2]

Appellant, however, maintained some contact with Hernandez, who admitted she still wanted him in her life to some degree. On occasion she would initiate contact with him. In 2013, additional criminal charges, the subject of this appeal, were brought against appellant following some encounters he had with Hernandez.[3] A jury found him guilty of burglary (§ 459; count 1); stalking (§ 646.9, subd. (a); count 2); stalking with a court order in effect (§ 646.9, subd. (b); count 3); vandalism (§ 594, subd. (b)(1); count 4); corporal injury to the parent of his child (§ 273.5, subd. (a); count 5); and disobeying a court order (§ 273.6, subd. (a); count 6). In a bifurcated trial, the court found true that he had been previously convicted of willful infliction of corporal injury (§ 273.5), which was an enhancement to counts 2 and 5.

As is relevant to this appeal, appellant was sentenced to an aggregate prison term of eight years four months, broken down as follows. For count 1, the upper term of six years was imposed. The court found that stalking (count 2) and stalking with a court order in effect (count 3) were charged in the alternative, and a consecutive one year was imposed for count 3. Counts 2 and 4 were stayed pursuant to section 654. For count 5,

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1 All future statutory references are to the Penal Code unless otherwise noted.

2 Merced Superior Court case No. CRM016154.

3 Merced Superior Court case No. CRM027502.

the court imposed a consecutive term of 16 months. Finally, for count 6, a concurrent sentence of 90 days was imposed.[4]

On appeal, appellant raises four broad issues, and we find merit to two of his claims.[5] First, the parties agree, as do we, that one of appellant's stalking convictions must be vacated pursuant to *People v. Muhammad* (2007) 157 Cal.App.4th 484 (*Muhammad*). Second, we agree with appellant that section 654 was violated when sentence was imposed upon counts 3 and 6. However, appellant's final two contentions are without merit. He argues the evidence was legally insufficient for his convictions of stalking and he contends the trial court violated his constitutional rights when it excluded the proposed trial testimony of his only witness.

We note that certain clerical errors occurred in the abstract of judgment and the trial court failed to impose sentence on count 4. We remand for resentencing but otherwise affirm.

BACKGROUND

Appellant rested following the prosecution's case-in-chief. Below is a relevant summary of the prosecution's case.

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4 Appellant was also concurrently sentenced in two companion cases: Merced Superior Court case Nos. CRM025080 and CRM016154.

In Merced Superior Court case No. CRM025080, appellant had pled no contest in 2012 to one felony count of assault with force likely to produce great bodily injury (§ 245, subd. (a)(4)). The court found appellant to be in violation of probation based on his convictions in Merced Superior Court case No. CRM027502. He was sentenced to one year consecutive to the sentence imposed in Merced Superior Court case No. CRM027502, for an aggregate term of nine years four months.

In case number CRM016154, the previously suspended sentence was ordered to be executed and appellant received a total of three years to be served concurrently to the nine years four months imposed in the two companion cases.

5 Via order dated March 25, 2014, this court construed the appeal in Merced Superior Court case No. CRM027502 to also be an appeal from the judgments entered in Merced Superior Court case Nos. CRM025080 and CRM016154.

I. Trial Facts

Appellant and Hernandez have two minor children together. They began dating in 2008 and their relationship was good at first. In 2011, however, appellant attacked Hernandez at her residence when several friends were at her house. She had been very jealous of appellant that day and believed he was cheating on her. They argued throughout the day. In her bedroom, appellant said he would have sex with one of her friends in the living room, which angered Hernandez. She charged at him and either tried to choke him or push him, but he ended up on top of her. Appellant choked her with his hands over her neck. She managed to scream loud enough that a male friend heard and tried to enter the bedroom through the shut door. Appellant put his hands on her mouth and pulled on her jaws, causing cuts to her mouth. The male friend entered the bedroom and fought with appellant.

After the fight ended, the friends left the residence. Appellant went to the kitchen and returned to the bedroom holding two knives. He told Hernandez he was going to kill her. She was afraid for her life. Hernandez told the jury she was holding their 10-month-old baby when this occurred. Appellant swung the knives at Hernandez's face, inflicting two slice wounds that drew blood. Appellant stopped and expressed remorse for his actions. Police officers arrived and documented Hernandez's injuries, which also included a black eye when he hit her with closed fists.

A criminal case was filed in superior court and a five-year restraining order was issued. Hernandez, however, continued to have voluntary contact with appellant despite the restraining order, and they remained romantically involved.

In the fall of 2011, Hernandez stayed at appellant's residence for two or three days. She told the jury that she tried to leave to go to her parents' house, but appellant prevented her. He became angry with her that day and wrapped an electrical cord around her neck in his bedroom. He began to squeeze the cord, and she told him to stop, complaining she could not breathe. She thought she was going to die. Appellant's

mother pounded on the bedroom door and Hernandez pretended to pass out to stop the attack. Appellant stopped his actions after Hernandez fell to the floor. She did not report this incident to law enforcement.

Despite this attack, Hernandez did not end the relationship and she continued to see appellant in the following weeks. She considered herself still in love with him, and she represented to people that they were still a couple.

In December 2011, Hernandez did not want to be with appellant, and she told him to leave her alone. She went to a party without telling him her whereabouts. At the party, Hernandez walked outside with two girlfriends. Appellant drove up and jumped out of his vehicle holding a gun. He grabbed Hernandez by her hair and began to hit her over her head with his gun. She begged him to stop many times, and he pulled her into his vehicle and drove her home. On the way, he warned her to "'watch'" what was going to happen when they got home. Hernandez told the jury she thought she was going to die.

At his residence, appellant pulled Hernandez out of the car and forced her into the backyard. He kicked and punched her while she lay on the ground until she blacked out. She ended up in his garage and then the bathroom. She had blood "everywhere" on her hands and ripped clothes. She was missing a tooth and having trouble breathing. Appellant held the bathroom door shut and laughed at her while she asked him to call 911. Appellant's two sisters were there and he finally opened the bathroom door. Hernandez begged for somebody to call 911, and appellant said she was going to die because she was a slut. Appellant walked Hernandez to his bedroom, where she complained she needed medical help. She promised him that she would not tell anyone what he did to her. She knew he did not want to contact law enforcement because of the restraining order. Appellant eventually called 911 after expressing remorse for what happened. He instructed Hernandez to say she voluntarily came to his house after being attacked by others, which she agreed to do.

Hernandez was in the intensive care unit for four days and suffered broken ribs, punctures to her lungs, a broken tooth, and a broken nose. Her chin had been split open. She told both emergency personnel and later law enforcement that she had been attacked by seven or eight male gang members, who beat her up. She initially lied because she felt it was her only way to reach the hospital, and then she continued that lie so she would not get into trouble. She did not tell the truth until she spoke with an investigator from the prosecutor's office close to the time of her trial testimony.

Despite this attack, Hernandez told the jury that she remained in love with appellant and she continued to have romantic involvement with him. She became "[u]nexpectedly" pregnant with his second child. She testified, however, that she remained scared and she was careful "to do everything right" so he would not become mad. She told the jury she wanted to keep her family together so her son could grow up with a father.

In August 2012, Hernandez was staying with appellant's mother while she was pregnant because her parents were upset with her for continuing the relationship with appellant. While staying with his mother, she became jealous and knew he was with another girl. She questioned him, and they began to argue. He hit her and she fell to the floor on her stomach. He hit her stomach, and his mother and sisters tried to intervene. Appellant went to hit his mother, who tried to run out, but appellant hit a door, striking his mother's head. Appellant ran away, and law enforcement and medical personnel responded. Appellant's mother was taken to the hospital and required five staples to her head. Hernandez did not tell the officers that appellant punched her stomach because she was afraid he would not be there when she had the baby.

Hernandez continued to maintain a relationship with appellant. Although she was aware of the restraining order, she would initiate contact with him at times. She testified she was jealous of him. She wrote him letters and she sent him several photos of herself

while he was in jail because she was in love and did not want to let him go. She blamed herself for everything that happened and she hoped he would change.

However, Hernandez testified that by March 2013 she no longer wanted to be with appellant and she wanted to be alone. Nevertheless, she admitted that still allowed him to come to her residence to see their children, but she told the jury she continued to fear for her safety based on his past actions. Appellant did not have a key to her residence.

In March 2013, appellant came to her residence and spent time with the children. He ended up spending the night. There were times that she wanted him to leave but she told the jury she could not say that because he might become angry. She would either be in her room or she would "hang out" with him to keep him from being bothered, bored or mad. At some point they had an argument about her cell phone. He asked her to delete her Facebook and Instagram accounts, which she did not want to do. He threw her phone on the floor and broke it. She knew he was "going to flip out" so she ran to her cousin's house, which was nearby. She was scared. Her children remained at her residence. Appellant came outside and told her to return, but she refused. She called appellant's mother, who said to call law enforcement. Hernandez did not want to call the police. She gave a key to her cousin, who went to the residence and retrieved the children without incident. Her cousin said appellant was not there.

Hernandez returned to her residence and could not find her broken cell phone, which worried her. Appellant's mother called on her cousin's phone and said appellant's sister was coming to pick him up. Hernandez knew appellant was supposed to be picked up at a nearby clinic behind her residence so she went through her backyard to the clinic in hopes she could get her phone back. She saw appellant and asked him for her phone. He said it was in her closet. Appellant left with his sister. Hernandez returned home and found her home a mess. Some of her shoes had been damaged and burned, and some clothes had been ripped, which were mostly summer outfits. Hernandez explained these clothes bothered appellant, who had told her not to wear "short shorts." Appellant had

threatened before to "slice" her legs and "leave marks" so she would stop wearing shorts. Hernandez stayed with a friend that night and then with her mother for a few days because she believed appellant would come back. Hernandez did not report the incident to police. However, when she returned to her residence several days later she discovered that her back sliding door had been shattered and more damage had been done to her residence. She contacted law enforcement, and an officer, Jeffrey Horn, responded.

Hernandez informed Horn that her television, some money, and clothes were missing from the apartment. Some of her clothes and shoes had been slashed with a knife, and a knife was discovered in her bedroom. Appellant discovered her broken cell phone in a box of tissues.

Horn walked with Hernandez around her property and they discovered a lighter near her backyard fence that belonged to her. Appellant had been in possession of this lighter about a week before the burglary. She found appellant's inmate photo, which had been left on her dresser, and she gave it to Horn.

Horn recognized appellant from the photograph. Much earlier that same day, Horn had been dispatched to Hernandez's neighbor's residence after the neighbor had reported a "loud bang and suspicious noise." Horn had observed a male exiting Hernandez's residence. At trial, Horn identified appellant as the male he observed. Horn had spoken with appellant, who indicated that everything was fine inside Hernandez's residence. Horn left the area and was then dispatched to Hernandez's residence later in the day when she reported her burglary.

Horn asked if Hernandez had recently had a break-up with someone because the damage appeared more personal than a regular burglary. She told Horn about appellant, and said appellant had previously cut her clothes with a knife. She also reported that appellant had been repeatedly trying to contact her earlier in the day through two friends, sending one friend a message through Facebook and calling the other friend more than

20 times. Horn subsequently went to appellant's residence and searched it, but he did not locate the stolen television.

Several weeks later, around April 12, 2013, Hernandez needed baby diapers and appellant came to her residence at night. He said he would only stay a short time, but he spent the night. She did not feel safe, but she did not ask him to leave. She knew that asking him to leave would not work and it would cause an argument. She did not leave to go elsewhere because it was not bad and they were "just hanging out. He was playing it cool, and I was too." They slept together in her bedroom. When she woke up, he had her new cell phone in his hand, and he was accessing her e-mails and social networking messages. He began to question her about some of her messages, and he started to get angry, telling her to delete her Facebook and Instagram accounts. She said she would not do that, and he became mad. She took her phone and went outside where she called friends and family, trying to get someone to come pick her up because she was scared he was going to hurt her. A friend agreed to come over.

Appellant confronted Hernandez outside in the parking lot and he tried to grab her phone. She tried to dial 911. He shoved and grabbed her, and hit her mouth either with a closed fist or elbow, causing her lip to swell and break. He grabbed her phone and ran. She suffered bruising to her arms and chest from the scuffle.

Hernandez's friend arrived, and stated that she had summoned the police. An officer arrived and spoke with Hernandez. She told the officer that appellant had arrived at her residence that day. She did not tell police that appellant had spent the night because "he wasn't supposed to be there."

Hernandez spoke with a detective a few weeks later after she found additional damaged shoes in her closet. The shoes had been cut. She told the jury these shoes were undamaged when appellant spent the night on April 12, 2013. A detective visited her residence, taking pictures of the damaged shoes. Hernandez told the detective that appellant was not allowed at her residence.

Hernandez testified that she felt scared of appellant during the incidents that happened from March through April. She told the jury that she did ask him to leave on at least one of those occasions, but he would not do so. She explained that when he came over he would promise her that nothing would happen, or he would act sweetly towards her to show nothing would happen.

On cross-examination, Hernandez admitted that she did not tell the officer in March that appellant had spent the night because he was not supposed to be there and she did not want to get into trouble. She agreed with defense counsel that she lies when it is in her best interest. She admitted not telling the officer about all of the ripped clothing that she found on March 10, 2013, or testifying about it at the preliminary hearing, because she did not want to "turn it into a big thing" because it was not as bad as the ripped clothes that occurred on March 18, 2013. She did not show the officer the burned shoes because she threw them away. She admitted that a lot of her fights with appellant were about jealousy and other girls. She also admitted that she contacted some women whom appellant knew, telling the women that she had a family with him.

A detective met with appellant about Hernandez's allegations. Appellant said Hernandez was an ex-girlfriend, with whom he had broken up approximately two or three years before the interview. Appellant denied having any recent contact with Hernandez, denied knowing the location of her apartment, and said he could not have contact with her because of the restraining order. Appellant was confronted with Horn's police report, and appellant denied being at Hernandez's apartment on March 18, 2013. Appellant then changed his story and stated he had some contact with Hernandez, but it was to discuss visitation rights. Appellant was confronted with his inmate card, which had been recovered in Hernandez's residence. Appellant believed Hernandez could have taken that card from his mother's house. Appellant said Hernandez was making up the allegations and trying to set him up.

The same detective also met with Hernandez, who subsequently reported she had located the money that she previously believed was missing. She stated she was "very afraid of the situation" she had with appellant. She never informed the detective that appellant had spent nights at her residence.

II. Relevant Closing Arguments

At the start of closing arguments, the prosecutor stated that everything appellant did to Hernandez was calculated "to control her and everything that she did, verbal abuse, the threats, the physical acts of violence. Everything [appellant] did to [Hernandez] was designed to keep his control over her." The prosecutor reminded the jury that appellant threatened to slash Hernandez's legs so she could no longer wear shorts, which was another attempt to control her. After discussing the past acts of violence that appellant committed, the prosecutor turned to the present case, noting each crime was charged separately.

The prosecutor told the jury that the stalking charge was a "close call" and the jury should carefully look through the evidence. The prosecutor, however, said enough evidence existed to prove stalking based on Hernandez's testimony, pointing out there were repeated acts over a period of time. Appellant went to her residence in March and broke her phone and cut her dresses. He returned a week later, broke into her residence through her back door, stole her television, and ripped up more clothes. On that same day, appellant spent time repeatedly contacting two of Hernandez's friends looking for her. Finally, an argument occurred in April and appellant punched Hernandez in the parking lot.

The prosecutor acknowledged that Hernandez had allowed appellant to spend the night on multiple occasions, but argued Hernandez was in love with appellant and tried to please him. The prosecutor reminded the jury that appellant had previously used two knives to slash Hernandez's face, he had beaten her to the point she was hospitalized, and he punched his own mother in front of Hernandez. Hernandez testified that her feelings

of fear were sometimes overcome by her feelings of love. The prosecutor contended that Hernandez felt like she did not have a choice when appellant said he wanted to see her. The jury was asked to decide if appellant was maliciously contacting Hernandez based on their relationship and appellant's conduct.

DISCUSSION

I. Substantial Evidence Supports the Convictions for Stalking

Appellant asserts that his state and federal constitutional rights were violated because the evidence was legally insufficient to support a finding that he stalked Hernandez between March 10 and April 12, 2013. He seeks reversal of counts 2 and 3.

A. Standard of review

For an appeal challenging the sufficiency of evidence, we review the entire record in the light most favorable to the judgment to determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt based on credible evidence that is of solid value. (*People v. Jones* (2013) 57 Cal.4th 899, 960.) In doing this review, we are not required to ask whether we believe the trial evidence established guilt beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Rather, the issue is whether *any* rational jury could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence favorably for the prosecution. (*Ibid*.) We are to presume the existence of any fact the jury could have reasonably deduced from the evidence in support of the judgment. (*Ibid*.)

B. Analysis

Pursuant to section 646.9, stalking occurs when a person "willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family …." (§ 646.9, subd. (a).)

For purposes of section 646.9, "'harasses' means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or

terrorizes the person, and that serves no legitimate purpose." (§ 646.9, subd. (e).) The term "'course of conduct' means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of 'course of conduct.'" (§ 646.9, subd. (f).)

For purposes of section 646.9, "'credible threat' means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat…." (§ 646.9, subd. (g).)

Stalking is a specific intent crime, and the defendant must engage in a course of conduct intended to cause fear. (*People v. Falck* (1997) 52 Cal.App.4th 287, 296 (*Falck*).) However, the defendant need not actually intend to carry out the threat. It is enough if the victim reasonably fears for her safety, or that of her family, and the defendant made the threat intending to cause the fear. (*Id.* at pp. 297–298.) The entire factual context must be considered when determining if a threat occurred, including the listeners' reactions and the surrounding events. (*Id.* at p. 298.)

Here, on March 10, 2013, appellant broke Hernandez's cell phone and then cut some of her dresses after she ran from her residence in fear of him. Several days later, he broke into her residence when she was not home, slashing more clothes and causing additional damage. On that same day, he made numerous attempts to contact two of Hernandez's friends in an effort to locate her. Finally, on April 19, 2013, appellant was again at Hernandez's residence when he punched her outside in the parking lot. Appellant's actions show a knowing and willful course of conduct directed at Hernandez

that seriously alarmed, annoyed, tormented or terrorized her, and which served no legitimate purpose. His actions establish a course of conduct evidencing a continuity of purpose. (§ 646.9, subd. (f).)

Appellant cites three cases, *People v. Uecker* (2009) 172 Cal.App.4th 583 (*Uecker*); *People v. Halgren* (1996) 52 Cal.App.4th 1223 (*Halgren*); and *Falck, supra*, 52 Cal.App.4th 287, in an effort to distinguish his conduct from conduct that supports a stalking conviction. These cases are unpersuasive.

First, in *Uecker*, the defendant was found guilty of stalking two women. (*Uecker, supra*, 172 Cal.App.4th at p. 585.) Regarding the first victim, the defendant would wait near her vehicle at work when she went to lunch, even when her lunch hour varied. This pattern lasted for months, even after she moved her vehicle to other locations. The defendant began to leave her notes, and he repeatedly asked to spend time with her. She told him she was not interested. The defendant left a final note calling her an "'immature trouble making brat!'" The note said, "'Now what?'" The victim felt scared and contacted her employer about the situation. The following day, the defendant was seen in a spot where he could observe both the entrance to the employee parking lot and the employee entrance to the building. Law enforcement was summoned. (*Id.* at pp. 586–588.)

The second victim was a part-time real estate agent whom the defendant telephoned about needing assistance to find real property. The defendant called her about 30 times over a three-week period, with approximately 6 to 10 direct conversations. The defendant did not provide legitimate information so that the second victim could help him with real estate. The defendant left messages that upset the second victim and she attempted to cut off contact with him. She reported the defendant to law enforcement after he left messages cryptically indicating he wanted her to """handle""" his issues, """to finish""" what they had started, and he wanted """out of Dodge""" and she would

know why. She felt afraid and trapped. (*Uecker*, *supra*, 172 Cal.App.4th at pp. 588–590, 596.)

On appeal, the appellate court found sufficient evidence to affirm stalking as to both victims. The defendant repeatedly followed the first victim with the intent to disturb or annoy her, which reasonably caused her to fear for her safety, and which showed his intent to place the victim in reasonable fear for her safety. (*Uecker*, *supra*, 172 Cal.App.4th at pp. 594–595.) Likewise, although the defendant did not follow the second victim, he harassed her with the repeated telephone messages that were not legitimate. The voice messages implied a threat, which reasonably placed her in fear for her safety. (*Id.* at pp. 595–597.)

Second, in *Halgren*, the defendant was convicted of stalking a woman whom he first met at a grocery store. She refused his invitation to have lunch, but he learned where she worked. The next day, he telephoned her at her office and asked her to lunch, which she refused. He called again the following day, asking her to have lunch. She said she was going grocery shopping during her lunch hour to cook dinner that evening for her boyfriend. She said he could accompany her on the shopping trip, believing he would not do so. However, he arrived at her office and they drove in separate cars after she refused his invitation to ride with him. Inside the market he acted very strangely with her and outside he offered to help with her bags. When she refused, he pulled a badge from his pocket. She asked if he was a police officer, and he indicated he was very important. (*Halgren*, *supra*, 52 Cal.App.4th at pp. 1226–1227.) Many weeks passed until the next contact, when the defendant began making repeated calls to the victim both at her place of work and her residence. She told him to stop. During one phone conversation, the defendant said he would call her whenever he wanted and "'I am going to do to you whatever the fuck I want to.'" (*Id.* at p. 1227.) The victim felt terrified for herself and her son. She changed her telephone number to an unlisted one. On October 28, she stayed home from work, and coworkers saw the defendant pacing around their office.

Police were notified. The defendant called her office each day from October 29 until November 8 for a total of 25 to 30 calls, including hang-ups. On November 2, he said he missed her and she looked "'great today in black.'" (*Id*. at p. 1228.) She was wearing black that day. During another call, he said she would be sorry for being so rude to him. On November 8, coworkers saw the defendant outside their office building and the police were summoned. The defendant called the victim, who kept him on the line. The defendant said he was not going to let her be rude to him and he was either "'going to fix you'" or "'fix this.'" Police arrested him at a nearby pay phone. (*Ibid*.)

On appeal, the defendant contended, in part, that insufficient evidence supported the stalking conviction. The appellate court quickly dismissed this argument, determining the defendant made repeated telephone calls to the victim, despite her clear indication she was not interested. He left messages that were deemed credible threats, with a clear intent to place her in fear for her safety. The conviction for felony stalking was affirmed. (*Halgren*, *supra*, 52 Cal.App.4th at pp. 1232–1233.)

Finally, in *Falck*, the defendant, who suffered from schizophrenia, was convicted of stalking. When he was 35 or 36 years old, he became fixated with a 19-year-old woman who worked at a restaurant. He began to make repeated advances upon her, which she refused. He was eventually arrested and put on six months' probation, with an order to stay away from the victim. For 12 years he continued to think about the victim and compiled information about her. He then began trying to contact her again with telephone messages, letters, and a personal advertisement in the newspaper. His messages mentioned marriage, astrology, and what sexual acts they would perform together. He sent her pornographic images cut from magazines. When he was arrested, he told police he could not keep away from the victim, and he asked the interviewing officer to take him to her or at least give her his telephone number. By the time of trial, the defendant was again taking his medication and he told the jury he never intended to

cause any harm or to frighten the victim. He indicated his interest in her had faded. (*Falck, supra*, 52 Cal.App.4th at pp. 291–293.)

On appeal, the defendant challenged, in part, the sufficiency of the evidence regarding his intent to place the victim in reasonable fear. The *Falck* court rejected this argument, finding credible threats in the defendant's letters, which disclosed an obsessive desire to engage in sexual acts with the victim, marry her, and be with her. The defendant had also mentioned his proficiency with a rifle, which could have been construed as an intent to harm her. *Falck* determined the evidence inferred the defendant's intent to cause fear because he insisted on maintaining contact with her although she clearly attempted to avoid him, and he had also received warnings from the victim's husband, the police and the court to stay away. The judgment was affirmed. (*Falck, supra*, 52 Cal.App.4th at pp. 298–299.)

Appellant argues that his conduct is distinguishable from the behavior discussed in *Halgren*, *Falck*, and *Uecker*. He notes he was neither obsessed with Hernandez nor experiencing unrequited love. Hernandez never tried to cut off contact with him, and she admitted initiating contact despite the restraining order. Moreover, she allowed him to spend nights with her, which he contends shows he did not engage in a pattern of conduct that reasonably caused her to fear him. He states he went to Hernandez's residence with the legitimate purpose of visiting his children. He maintains he did not threaten her and concludes the evidence does not establish stalking between March 10 and April 12, 2013. We disagree.

Although conflicting inferences may be drawn regarding Hernandez's level of fear for her safety, on appeal we view the evidence in the light most favorable to the judgment (*People v. Jones, supra*, 57 Cal.4th at p. 960) and we presume the existence of any fact the jury could have reasonably deduced from the evidence in support of the judgment (*People v. Johnson, supra*, 26 Cal.3d at p. 576). Further, it is the trier of fact who makes

credibility determinations and resolves factual disputes. (*People v. Friend* (2009) 47 Cal.4th 1, 41.)

Hernandez testified that by March 2013 she no longer wanted to be with appellant and she wanted to be alone. However, she admitted that she still allowed him to come to her residence to see their children, but she told the jury she continued to fear for her safety based on his past actions. When he came to her residence in March 2013, Hernandez testified there were times she wanted him to leave but she could not say that because he might become angry. After appellant became angry with her regarding her social media messages and broke her phone, she knew he was "going to flip out" so she ran to her cousin's house, which was nearby. She told the jury that she was scared. She then returned home and found that appellant had ripped some of her clothes.

At some point, either that day or during the subsequent burglary, appellant placed Hernandez's broken phone into a tissue box, which she discovered after her home was burglarized. Hernandez also discovered appellant's inmate identification card, which had been left on her dresser after appellant broke into her residence.

When appellant came to her residence around April 12, 2013, Hernandez testified that she did not feel safe, but she did not ask him to leave because she knew that would not work and it would cause an argument. She admitted she allowed him to spend the night because "it wasn't bad. We were just hanging out, I guess. He was playing it cool, and I was too." The next morning, after appellant became mad following his renewed questioning regarding her social media messages, she testified that she took her phone and went outside where she called friends and family, trying to get someone to come pick her up because she was scared he was going to hurt her. When appellant confronted her outside, she tried to dial 911, and he shoved and grabbed her. He struck her mouth, grabbed her phone, and ran. Hernandez told the jury she felt scared of appellant during the incidents that happened from March through April. She also told the jury she asked him to leave on at least one of those occasions, but he would not do so.

We are not required to ask whether we believe the trial evidence established guilt beyond a reasonable doubt. (*People v. Johnson*, *supra*, 26 Cal.3d at p. 576.) Hernandez explained her actions to the jury, including why she allowed appellant to enter her residence despite her professed fear of him. Based on its verdicts, the jury clearly accepted Hernandez's testimony, and we will not reassess her credibility on appeal. (*People v. Friend*, *supra*, 47 Cal.4th at p. 41.) Hernandez's testimony was sufficient by itself to prove the facts necessary to convict appellant. (CALCRIM No. 301.)

Appellant willfully and maliciously engaged in a knowing and willful course of conduct directed at Hernandez that seriously alarmed, annoyed, tormented, or terrorized her, it served no legitimate purpose, and it carried an implied threat of violence with the intent to place her in reasonable fear for her safety. (§ 646.9, subds. (a) & (e).) This evidence was reasonable, credible, and of solid value such that a reasonable jury could find appellant guilty beyond a reasonable doubt. Accordingly, appellant's stalking convictions will not be reversed for insufficient evidence.

II. The Trial Court Did Not Abuse Its Discretion When It Excluded the Proposed Trial Testimony of Appellant's Witness

Appellant asserts that the trial court abused its discretion when it excluded from trial the proposed testimony of his only defense witness, Margarita Andrade. He contends the court's actions prejudicially violated his rights to due process, a fair trial, and the right to present a defense. He seeks reversal of counts 1 through 5.

A. Background

At the start of the second day of trial, after Hernandez testified, the prosecutor informed the court that the defense intended to call a witness whom Hernandez had allegedly threatened in the past with many phone calls and text messages. The prosecutor objected that the offer of proof was insufficient because she had no information regarding the nature of the threats, the context, or when it occurred. The prosecutor also objected

that it would be hearsay because Hernandez was not confronted with this information and given a chance to explain or deny it.

Defense counsel explained that Margarita Andrade, the proposed witness, had dated appellant in 2012. Andrade received many phone calls and texts from Hernandez, but Hernandez had testified at trial that she was terrified of appellant. The defense hoped to use Andrade to show Hernandez's testimony was not true because "if she's constantly calling his current girlfriend, she's obviously trying to make contact with [appellant], or at least be involved in [appellant's] life."

The court noted that Hernandez had already testified at trial that she had "put herself back in [appellant's] life all the time after these instances." The prosecutor interjected that Hernandez had also testified she "would get jealous over him; so, I don't see the relevance." The prosecutor objected that this was not proper impeachment evidence, and defense counsel submitted the matter to the court.

The trial court noted it was "not necessarily impeachment. It kind of actually in an odd sort of way bolsters her testimony. That's what she testified to that she, you know, was jealous and she would, you know—she loved [appellant] and wanted him back. I don't think there's any dispute about that." The court determined that the proposed testimony was cumulative, stating, "I don't think that anybody after hearing Ms. Hernandez testify, anybody can dispute that she—she, frankly, admitted she was jealous, admitted she wanted [appellant] back; so, I find it's cumulative."

B. Standard of review

A "trial court has discretion to exclude impeachment evidence … if it is collateral, cumulative, confusing, or misleading. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 412.) A trial court is given considerable discretion to determine whether evidence is relevant. (*People v. Williams* (2008) 43 Cal.4th 584, 634.) Under Evidence Code section 352, a trial court has broad discretion to determine whether the probative value of evidence is substantially outweighed by the undue consumption of time, or whether it

could create a substantial danger of confusing the issues, misleading the jury, or causing undue prejudice. (*People v. Williams*, *supra*, at p. 634.) For purposes of Evidence Code section 352, we review a trial court's ruling for an abuse of discretion. (*People v. Williams*, *supra*, at p. 634.) Under this standard, the court's ruling will not be disturbed on appeal unless a manifest miscarriage of justice occurred from a decision that was patently absurd, arbitrary or capricious. (*Id.* at pp. 634–635.)

C. Analysis

As an initial matter, the parties dispute whether appellant has forfeited his constitutional claims by failing to object on those specific grounds in the lower court. We need not, however, resolve this dispute because, when we presume no forfeiture occurred, appellant's claim fails on its merits.

Appellant argues that this evidence would have contradicted Hernandez, who testified numerous times that she was terrified of appellant and had no choice but to spend time with him. Andrade's proposed testimony would have shown that Hernandez tried to put herself back into appellant's life by confronting his current girlfriend and Hernandez was jealous. He contends Andrade's potential testimony would not have been cumulative because it would have offered a different prospective and would have shown the extent of Hernandez's jealously and her motive to fabricate. We disagree.

Hernandez told the jury that despite appellant's actions towards her, including some violent attacks, she continued to see him. She considered herself still in love with him and she represented to people that they were still a couple. She wanted to keep her family together. Although she was aware of the restraining order, Hernandez told the jury she would initiate contact with appellant. She wrote him letters when he was in jail, sending him photos of herself. She agreed that she was jealous of appellant, who did not like it when she was jealous, and many of their fights occurred because of her jealousy. She admitted confronting women whom appellant knew, telling them she had a family with him.

The court had heard all of Hernandez's trial testimony when it ruled to exclude Andrade's proposed testimony. This record does not demonstrate that the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a miscarriage of justice. Accordingly, the trial court did not abuse its discretion.[6]

III. Section 654 Was Violated When Multiple Sentences Were Imposed

In a series of three separate but overlapping arguments, appellant contends section 654 was violated when sentence was imposed upon counts 1, 3, 5 and 6. He asserts that the burglary, infliction of corporal injury, and/or disobeying the court order were done with the same criminal intent to commit the crime of stalking. He seeks resentencing.

A. Background

At sentencing, the trial court made the following relevant comments:

> "On Count 1, sir, that's the first degree burglary, you are committed to the California Department of Corrections for the upper term of six years.
>
> "I find Count[s] 2 and 3 to have been charged in the alternative. They both involve stalking. Count 3 was stalking, [section] 646.9[, subdivision](b), while the domestic violence restraining order was in effect. That increases the triad to 2, 3, 4. So on Count 3, one-third the middle term of one year consecutive since the punishment on Count 2 is stayed pursuant to … section 654.
>
> "On Count 4, the vandalism charge, I find that punishment on that charge is prohibited by … section 654; although, there was testimony of other instances where [appellant] had damaged [Hernandez's] property, it was alleged to have been the same date as the burglary in the Complaint and Information and I checked that.
>
> "On Count 5, the [section] 273.5[, subdivision](e), the triad is 2,4,5; one-third the middle term of 16 months consecutive, for a total of eight years, four months, in the California Department of Corrections in this case.

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[6] Because the trial court did not abuse its discretion, we will not address appellant's argument that he suffered prejudice.

"On Count 6, probation is denied. 90 days concurrent."

B. Standard of review

Generally, a person may be convicted of more than one crime arising from the same act or course of conduct, but he or she may not be punished for the multiple offenses. (*People v. Correa* (2012) 54 Cal.4th 331, 337.) Execution of sentence must be stayed on all but one count for multiple convictions that arise from a single act or course of conduct. (*Ibid.*)

It is primarily a question of fact whether multiple convictions are part of an indivisible transaction. (*People v. Martin* (2005) 133 Cal.App.4th 776, 781.) The substantial evidence test is used on appeal to review such a finding. (*Ibid.*) In conducting this review, we are to consider the evidence in the light most favorable to respondent and we presume the existence of every fact the factfinder could reasonably deduce from it. (*Ibid.*)

C. Analysis

The first amended information only specified April 12, 2013, as the date alleging when count 6 (disobeying the court order) was committed. Respondent concedes that appellant was in violation of the restraining order when he engaged in acts of harassment in March and April, but asserts the stalking charges included acts not punished by count 6, making it divisible from count 3. Respondent further contends appellant's intent to commit burglary and infliction of corporal injury were different from an intent to harass Hernandez. Respondent maintains section 654 was not violated. We disagree.

It is impossible for appellant to have inflicted corporal injury upon Hernandez (count 5) without also intentionally and knowingly violating the court's previous restraining order (count 6). Further, it was the prosecution's theory that the jury could convict appellant for stalking because of his repeated acts over time, including the burglary and infliction of corporal injury. The prosecutor argued that everything appellant did was calculated to keep control of Hernandez. This record demonstrates that

the convictions for burglary, stalking, and infliction of corporal injury (counts 1, 2, 3 and 5, respectively) arise from the same course of conduct, especially in light of the prosecution's closing arguments. Any other conclusion would permit the government to obtain convictions for stalking based on a theory presented to the jury that the government then changed on appeal in order to justify the imposition of overlapping punishments. (See generally *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350–1351, fn. 12 [a party is generally not permitted to adopt a new and different theory on appeal].)

Appellant is to be punished under the provision that provides for the longest potential term of imprisonment, but he is not to be punished for the same act under more than one provision. (§ 654, subd. (a).) Burglary (count 1) of an inhabited house constitutes first degree burglary, which is punishable by imprisonment in state prison for two, four or six years. (§§ 460, subd. (a), & 461, subd. (a).) Stalking with a court order in effect (count 3) is punishable by two, three or four years in state prison. (§ 646.9, subd. (b).) Likewise, willful infliction of corporal injury (count 5) is punishable by two, three or four years in state prison. (§ 273.5, subd. (a).) Finally, the crime of disobeying a court order (count 6) is a misdemeanor punishable by a fine of not more than one thousand dollars or imprisonment in a county jail for not more than one year, or by both that fine and imprisonment. (§ 273.6, subd. (a).)

Here, the sentencing court imposed the upper term of six years for count 1 (burglary); it imposed one year for count 3 (stalking with a court order in effect); it imposed 16 months for count 5 (corporal injury); and it imposed 90 days concurrent for count 6 (disobeying a court order). Accordingly, pursuant to section 654, sentence should be imposed for counts 1 and 5, but not for counts 3 or 6, which should be stayed pursuant to section 654. This provides the longest potential term of imprisonment for appellant, but avoids punishment for the same act under more than one provision. (§ 654, subd. (a).)

IV. Count 2 Must Be Vacated

Under section 646.9, a defendant convicted of stalking may be imprisoned either in a county jail (with or without a fine) or imprisoned in state prison. (§ 646.9, subd. (a).) An additional penalty of two, three or four years in state prison is imposed when a defendant commits stalking in violation of a temporary restraining order, injunction, or court order in place to protect the same victim from the behavior described in section 646.9, subdivision (a). (§ 646.9, subd. (b).) When a defendant commits stalking following a felony conviction under sections 273.5, 273.6, or 422, the defendant is to be either imprisoned in county jail (with or without a fine) or imprisoned in state prison for two, three or five years. (§ 646.9, subd. (c)(1).) Finally, a defendant who is a repeat stalking offender is to be imprisoned in state prison for two, three or five years. (§ 646.9, subd. (c)(2).)

Appellant asserts he was erroneously convicted of both stalking (§ 646.9, subd. (a); count 2) and stalking with a court order in effect (§ 646.9, subd. (b); count 3) because both counts involved the identical course of conduct against the same victim. He relies upon *Muhammad*, *supra*, 157 Cal.App.4th 484 to establish error, contending this court should strike his conviction for count 2.

In *Muhammad*, *supra*, 157 Cal.App.4th 484, the defendant was charged and convicted of four counts of stalking the same victim. Count 1 was "simple" stalking (§ 646.9, subd. (a)); count 2 was stalking in violation of a court order (§ 646.9, subd. (b)); count 3 was stalking with a prior conviction for making terrorist threats (§ 646.9, subd. (c)(1)); and count 4 was stalking with a prior conviction for stalking (§ 646.9, subd. (c)(2)). (*Muhammad*, *supra*, at p. 489.)

On appeal, the *Muhammad* court determined that subdivisions (b), and (c)(1) and (2) of section 646.9 are penalty provisions triggered when the crime of stalking is committed under subdivision (a) and the defendant has a specified history of misconduct. (*Muhammad*, *supra*, 157 Cal.App.4th at p. 494.) The appellate court found that the

defendant committed the crime of stalking against a single victim when a temporary restraining order was in effect protecting her, after he had been previously convicted of making terrorist threats, and after he had been previously convicted of felony stalking. Thus, the defendant committed a single offense of stalking, but his past history triggered three separate penalty provisions that required greater punishment than what is imposed in section 646.9, subdivision (a). (*Muhammad*, *supra*, at p. 494.) Because the defendant was charged in four separate counts, three of his stalking convictions had to be vacated. Because the trial court selected the count 4 conviction (§ 646.9, subd. (c)(2)) as the principal term, the appellate court affirmed that conviction and vacated the other three convictions involving stalking. (*Muhammad*, *supra*, at p. 494.)

Here, appellant was charged and convicted of stalking (§ 646.9, subd. (a); count 2) and stalking with a court order in effect (§ 646.9, subd. (b); count 3). In a bifurcated trial, the court found true that appellant had been previously convicted of willful infliction of corporal injury (§ 273.5), which was an enhancement to counts 2 (stalking) and 5 (corporal injury). Both stalking crimes involved the same victim and the same conduct, which the prosecutor acknowledged in closing arguments. Consequently, appellant was guilty of only one count of stalking and one of his stalking convictions must be vacated.

We disagree with respondent that count 3 should be vacated or that count 3 should reflect the enhancement that the trial court found true for counts 2 and 5. The trial court selected count 3 as the principal term for the stalking conviction after finding that counts 2 and 3 were charged in the alternative. Respondent does not contend that the court either abused its discretion or erred as a matter of law. Because the sentencing court selected count 3 as the stalking conviction on which to impose sentence, we deem it appropriate to affirm that conviction. We vacate count 2.

V. The Trial Court Must Impose Sentence on Count 4

A trial court is required to impose a sentence on every count but then stay execution of sentence as appropriate to comply with section 654. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1472.)

Respondent correctly notes that the trial court did not impose sentence on count 2 (stalking) and count 4 (vandalism) prior to staying sentence on those counts pursuant to section 654. Respondent asks this court to modify the judgment rather than remanding the case for resentencing in order to avoid the cost and burden necessary to transport appellant from state prison to Merced County. Respondent contends the aggravated terms should be imposed on counts 2 and 4.

We decline respondent's request to modify the judgment in lieu of remanding the case for resentencing because count 2 is vacated and appellant's prison time will change in light of this opinion. Upon remand, the trial court is directed to impose sentence on count 4, which should then be stayed pursuant to section 654.

VI. The Abstract of Judgment Contains Clerical Errors

In Merced Superior Court case No. CRM027502, appellant was convicted of burglary (§ 459; count 1); stalking (§ 646.9, subd. (a); count 2); stalking with a court order in effect (§ 646.9, subd. (b); count 3); vandalism (§ 594, subd. (b)(1); count 4); corporal injury to the parent of his child (§ 273.5, subd. (a); count 5); and disobeying a court order (§ 273.6, subd. (a); count 6).

The abstract of judgment, however, does not reflect conviction of count 6 and it erroneously lists conviction in count 5 under section 273.5, former *subdivision (e)(1)*. On its own motion, an appellate court with jurisdiction of a case may order correction of clerical errors contained in an abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 186–187.) Accordingly, upon resentencing, the trial court is directed to prepare an amended abstract of judgment that accurately reflects the judgment.

DISPOSITION

This matter is remanded to the trial court for resentencing as follows. The conviction on count 2 is vacated. The trial court shall impose sentence on count 4, which shall be stayed pursuant to Penal Code section 654. The sentences imposed on counts 3 and 6 are stayed pursuant to section 654. The amended abstract of judgment shall reflect conviction on count 5 under Penal Code section 273.5, subdivision (a), and conviction on count 6 under Penal Code section 273.6, subdivision (a). The trial court shall forward the amended abstract of judgment to the appropriate authorities. The judgment is otherwise affirmed.

_____
KANE, Acting P.J.

WE CONCUR:

_____
FRANSON, J.

_____
SMITH, J.